

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LOREN L. HENSON
Claimant

VS.

CITY OF HUTCHINSON
Self-Insured Respondent

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Docket No. 1,039,712

ORDER

STATEMENT OF THE CASE

Respondent requested review of the June 4, 2008, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Mitchell W. Rice of Hutchinson, Kansas, appeared for claimant. Scott J. Mann, of Hutchinson, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found claimant demonstrated good cause for enlarging the notice period to 75 days, making his March 4, 2008, notice of his February 5, 2008, injury timely. In the alternative, the ALJ also found that claimant suffered additional injury to his low back through February 29, 2008. Accordingly, the ALJ found that claimant was entitled to temporary total disability benefits and medical benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 4, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file. The record does not contain any discovery deposition transcript, and this Board Member has not considered any such testimony.

ISSUES

Respondent requests review of the ALJ's finding that claimant demonstrated just cause to enlarge the 10-day notice period to 75 days. Respondent also questions whether claimant suffered additional injury to his low back or aggravated his original injury through February 29, 2008. Last, respondent questions whether claimant gave notice of a series of accidents through February 29, 2008, with notice of the time, date and particulars in accordance with K.S.A. 44-520.

Claimant argues that the record establishes that he met his burden of proof regarding a personal injury by accident on February 5, 2008, and a series of accidents through February 29, 2008, that arose out of his employment with respondent. Claimant also argues that he had just cause for his delay in giving timely notice of his February 5, 2008, accident, and that respondent stipulated to timely notice of a series of accidents through February 29, 2008. Claimant also contends that respondent, in its brief to the Board, improperly cited to a discovery deposition that was not stipulated into the record.

The issues for the Board's review are:

(1) Did the claimant demonstrate just cause to enlarge the 10-day notice period to 75 day?

(2) Did claimant sustain a series of accidents through February 29, 2008? If so, did claimant give notice of the series of accidents, specifically giving respondent notice of the time, date and particulars thereof?¹

FINDINGS OF FACT

Claimant worked for respondent's street department as an equipment operator. On February 5, 2008, at about 8:15 a.m., he was making adjustments on a snow plow when he felt something in his back that would not go away. He felt pain across his low back that radiated down into his right leg. He believed he had pulled a muscle.

After making the adjustments on the snow plow, claimant waited in the truck for the expected snow storm. During the six to six and a half hours he waited, he continued to have discomfort in his back. The snow came in about 3 p.m., and he drove the truck the rest of the day until 7 or 8 a.m. the morning of February 6. He felt pain off and on the entire time. Claimant continued to work on February 7 driving trucks. He continued to have pain in his back that he assumed was a pulled muscle. He characterized the sensation as aches and pains and said he did not report all his aches and pains to his supervisor. However, he had never had pain that radiated from his back down into his leg before.

Claimant had previously been scheduled to be off work from February 8 to February 18 because his wife was having surgery. While he was at home with his recuperating wife, his physical activities were limited, and his back began to feel better. He went back to work again on February 18 and worked to February 29. The bulk of that time he spent driving a truck. However, on the afternoon of February 28 and on February

¹ Although respondent's brief to the Board lists notice of the series of accidents through February 29, 2008, as an issue, it also contains a stipulation that "admits timely notice on the series of accidents from February 18 through 29, 2008." Respondent's Brief at 2 (filed July 29, 2008).

29, he ran a loader. He had to climb a ladder five to six feet to get to the floor of the loader. This required him to pull up his weight as he climbed. His back pain intensified, and it became obvious to him that there was something more wrong with his back than a pulled muscle.

The next day claimant was scheduled to work was March 3. By then he was not better and called in to work, telling his supervisor that he was not feeling well. On Tuesday, March 4, he again called in, this time reporting his work injury to his supervisor. That same day he went in to work and filled out an accident report claiming an injury on February 5, 2008, while installing and adjusting a chain lift on a snow plow. Claimant noted on the accident report that he thought he had pulled a muscle but as time went on, his pain increased. The accident report does not specifically indicate a series of accidents ending on February 29, 2008, or any injury from climbing in and out of a loader.

Claimant admits he received a copy of respondent's handbook that includes a provision that on-the-job injuries are to be reported, in writing, to the department or division head during the same working shift. He also had a previous work injury in 2004 to his right knee. He said a coworker called his supervisor to the scene of that accident and he received medical treatment. He assumes he filled out an accident report on the 2004 injury but could not recall when that was done.

Respondent denied workers compensation benefits to claimant because he failed to report the injury within 10 days. He was told to seek treatment from his personal physician. The medical reports set out a history of the February 5, 2008, injury but do not mention a series of accidents or an injury when climbing in and out of a loader. Claimant testified, however, that he told Dr. H. Karl Radke that after February 5 he had been climbing in and out of trucks and loaders at work and that activity seemed to make his condition worse. He did not tell the surgeon, Dr. John Dickerson, about climbing in and out of a loader but only stated he was injured working on the snow plow. Dr. Radke's notes made at claimant's initial office visit on March 4, 2008, contain a history that includes a description of the snow plow incident followed by a progressive worsening.

[Claimant] is a 45-year-old gentleman here for complaints of a Workman's Comp injury where he strained his back about a month ago. He said he was putting a snow plow on a truck in the morning and waited for the snow event later in the day, then worked all night and felt some tightness in his back that progressively worsened over the coming weeks. He was off work after a couple of days from the original injury thinking that perhaps he just pulled a back muscle, but it steadily worsened to where he was having gluteus discomfort in the right side along with right leg radiculopathy with tingling, numbness and burning. He finds it difficult to stand due to the pain. He has not had any prior history of back problems. He has

been taking his Hydrocodone tablets one to two up to eight tabs per day with minimal relief.²

Claimant filed an Application for Hearing on April 16, 2008, at which time he reported he had injured his back on February 5, 2008, as a result of installing a snow plow. An Amended Application for Hearing was filed on June 2, 2008, setting out the date of accident as February 5, 2008, and a series from February 18 through February 29, 2008.

PRINCIPLES OF LAW

K.S.A. 44-520 provides:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or © the employee was physically unable to give such notice.

K.S.A. 2007 Supp. 44-508(d) defines "accident" as

an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2007 Supp. 44-508(e) further defines "injury":

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such

² P.H. Trans., Cl. Ex. 1 at 9.

character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁴

ANALYSIS

In considering whether just cause exists, the Board has listed several factors which must be considered: (1) the nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually; (2) whether the employee is aware he or she has sustained an accident or an injury on the job; (3) the nature and history of claimant's symptoms; and (4) whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

Although claimant was aware that he was injured on February 5, 2008, and of his duty to report injuries, it is common for manual laborers to experience aches and pains on the job. Typically, not every injury and minor ache and pain is reported, especially if medical treatment is considered to be unnecessary. But when claimant's symptoms persisted and he determined that his injury was not necessarily temporary and that medical treatment might be necessary, he promptly reported his injury to his supervisor. This was within 75 days of the initial accident. Claimant also reported that his symptoms had worsened due to his subsequent work activities. Respondent was provided notice on March 4, 2008, of the February 5, 2008, accident and subsequent aggravations.

CONCLUSION

(1) Claimant has shown just cause for his failure to notify his employer of his accident within 10 days. As claimant gave notice within 75 days, the statute has been satisfied.

(2) Claimant suffered a series of accidents and aggravations to his low back injury each and every working day following his initial February 5, 2008, accident. The purpose

³ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁴ K.S.A. 2007 Supp. 44-555c(k).

of the notice statute was satisfied by his March 4, 2008, conversation with his supervisor and his written report of accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated June 4, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2008.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Scott J. Mann, Attorney for Self-Insured Respondent
Bruce E. Moore, Administrative Law Judge